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RE YONG TET ON, PAUL, EX PARTE CHUNG KHIAW BANK LTD.

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
TUAN IAN H.C. CHIN J
[BANKRUPTCY PETITION NO. 89 OF 1985]
b 14 OCTOBER 1995

BANKRUPTCY: *Bankruptcy notices - Judgment debt not quantified - Whether notice a nullity - Receiving and adjudication orders obtained pursuant thereto - Whether also a nullity - Whether regardless of their*
c *nullity, the orders must be obeyed - Court's discretion to annul orders - Whether discretion should be exercised.*

This motion by the debtor was taken out subsequent to the dismissal by the High Court of the debtor's application to set aside the creditor's bankruptcy notices, the receiving and adjudication orders and the withdrawal of an appeal
d to the Supreme Court.

It was submitted by the learned Counsel for the debtor that the debtor's failure to comply with the bankruptcy notices cannot amount to acts of bankruptcy because the judgment debt was not quantified. He urged the Court to exercise
e its discretion to set aside the orders on the ground that the bankruptcy notices were a nullity *ab initio* and that a failure to comply with them cannot be acts of bankruptcy and a petition founded upon such acts must necessarily fail. Counsel for the creditor on the other hand submitted that the motion ought to be dismissed for abuse of the process of the Court since a similar application to annul and rescind was earlier made and dismissed, and the appeal for the
f same was withdrawn.

Held:

[1] A person against whom an order of Court has been issued is duty bound to obey that order until it is set aside. It is not open for him to decide
g for himself whether the order was wrongly issued and therefore does not require obedience. His duty is one of obedience until such time as the order may be set aside or varied.

[2] Since in ss. 92(1) and 105(1) of the Bankruptcy Act 1967, the word
h "may" is used as opposed to the word "shall" in various other sections of the Act, the Court is of the view that a discretion to annul has been conferred on the Court.

[3] By the present motion, the debtor is attempting to challenge a decision of a competent jurisdiction which decision the debtor did not pursue in the
i appeal he had filed and is an abuse of the process of the Court.

[4] There are no factors in favour of the debtor that should move the Court in exercising its discretion in his favour. The debtor had only stated in his affidavit that the proceedings were invalid but did not explain whether he can settle the judgment debt or is going to. Neither did he explain the reason why he took out the motion after more than four years has elapsed from the day he was adjudged bankrupt.

[5] The needs of society sometime influence the development of the common law and thus influence the exercise of discretion. The debtor, in the absence of evidence to the contrary, can rightly be said to be hopelessly insolvent. The Court should not let him loose and set him upon the unwary businessmen to get credit and incur more debts.

[Motion dismissed with costs].

Cases referred to:

Low Mun v. Chung Khiaw Bank Ltd. [1988] 1 MLJ 263 ***(refd)***

Ghazali bin Mat Noor v. Southern Bank Berhad & 4 Other Appeals [1989] 2 CLJ 380, [1989] 2 MLJ 142 ***(refd)***

Chong Chin Shoong v. Development & Commercial Bank Bhd. [1990] 1 MLJ 285 ***(refd)***

Fawzia bte Osman v. Bank Bumiputra Malaysia Bhd. & Anor. Appeal [1991] 1 CLJ 652, [1991] 1 MLJ 426 ***(refd)***

Ban Hin Lee Credit Sdn. Bhd. v. Utama Computer Centre Sdn. Bhd. & Ors. [1991] 1 CLJ 711, [1991] 2 MLJ 327 ***(dist)***

Re Douglas Tay Guan Shung, ex parte the Government of Malaysia [1994] 3 CLJ 111 ***(foll)***

In re Hester [1889] 22 QBD 632 ***(foll)***

Eu Finance Berhad v. Lim Yoke Foo [1982] 2 MLJ 37 FC ***(refd)***

Wee Choo Keong v. MBf Holdings Berhad & Anor. [1993] 3 CLJ 210, [1993] 2 AMR 28: 1205 SC ***(refd)***

Tractors Malaysia Bhd. v. Charles Au Yong [1982] 1 MLJ 320 ***(refd)***

Re Telescriptor Syndicate Ltd. [1903] 2 Ch. 174 ***(refd)***

Re Seow Yin Foong [1994] 2 CLJ 845 ***(refd)***

In re Hong Kim Sime (HC, Tawau, Bankruptcy Petition No. 140 of 1993, 5 Aug. 1994) ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, ss. 92(1), 105(1)
Bankruptcy Act 1983 (UK), s. 35

Other source referred to:

The Digest, Vol., 4(2), para. 4286

For the creditors - S.A. Wong; M/s. Skinner Lind Willie Wong & Chin Roderic Fernandez; M/s. Shelley Yap Leong Chong Tseu & Chia Maureen Lind; M/s. Lind & Co.

For the debtor - Ho Kin Kong; M/s. Ho Chong Yong Vanugopal

JUDGMENT

Ian H.C. Chin J:

History

The chronology began with the year of 1984 when Chung Khiaw Bank Ltd., Hongkong, ("the creditor") obtained two judgments against Paul Yong Tet On ("the debtor") and these were on 30 July 1984, registered with the High Court, Kota Kinabalu. The debtor applied unsuccessfully to set aside the registration. On 15 March 1985, two bankruptcy notices were served on the debtor. Though applications were taken out to set aside the bankruptcy notices, these were withdrawn. A petition to have the debtor adjudged a bankrupt was opposed by the debtor but the Court on 30 April 1986, dismissed the objection and made orders of receiving and adjudication ("the said orders") against the debtor. There was no appeal against this decision of the High Court. The said orders were served on the debtor on 15 October 1986. The debtor then in 1987 applied to set aside the bankruptcy notices and said orders under ss. 92(1) and 105(1) of the Bankruptcy Act on the ground that the interest was not quantified or ascertained but the application was on 10 November 1988, dismissed by the High Court and the appeal to the Supreme Court against which decision was withdrawn by the debtor. On 7 August 1991, the debtor took out the present motion (dated 28 January 1993) to set aside the said orders. It was only fixed for hearing on 1 March 1993, but was adjourned. It was finally heard by me on 18 September 1995, where after hearing arguments I dismissed the motion. The following are the grounds for my decision.

The Contentions

Mr. Ho Kin Kong, learned Counsel for the debtor, submitted that the failure to comply with the bankruptcy notices cannot amount to acts of bankruptcy upon which the said orders were made because the judgment debt was not quantified. Mr. Ho then urged the Court to exercise its discretion, which he conceded the Court has, to set aside the said orders on the ground that the bankruptcy notices were a nullity *ab initio* and that a failure to comply with them cannot be acts of bankruptcy and a petition founded upon such acts must necessary fail, citing *Low Mun v. Chung Khiaw Bank Ltd.* [1988] 1 MLJ 263; *Ghazali bin Mat Noor v. Southern Bank Berhad & 4 Other Appeals* [1989] 2 MLJ 142; *Chong Chin Shoong v. Development & Commercial Bank Bhd*. [1990] 1 MLJ 285; *Fawzia bte Osman v. Bank Bumiputra Malaysia Bhd. & Anor. Appeal* [1991] 1 MLJ 426. Since there is no argument to the contrary, I assume that the bankruptcy notices and the said orders in our case were a nullity. Though Mr. Ho had said that the Court has a discretion he cited authorities which seem to suggest that the debtor is entitled *ex debito justitiae* to have the said orders set aside. In this regard, learned Counsel cited *Ban Hin Lee Credit Sdn. Bhd. v. Utama Computer Centre Sdn. Bhd. & Ors.* [1991] 2 MLJ 327 (Edgar Joseph Jr. J) but that case

concerns the renewal of a prohibitory order. Since the existence of a discretion appears to have been questioned, albeit obliquely, I thought it best I address myself the issue. So, does the Court have a discretion whether to annul or not the said orders where the bankruptcy notices and, consequently, the said orders were a nullity? I am of the view that the Court has. Since in ss. 92(1) and 105(1) of the Bankruptcy Act 1967, the word "may" is used as opposed to the word "shall" in various other sections of the Act, I am of the view that a discretion has been conferred on the Court (*Re Douglas Tay Guan Shung, ex parte the Government of Malaysia* [1994] 3 CLJ 111; *In re Hester* [1889] 22 QBD 632 [CA] are two cases which say the Court has a discretion) notwithstanding the nullity of the said orders.

As for *Eu Finance Berhad v. Lim Yoke Foo* [1982] 2 MLJ 37 FC, I assume learned Counsel meant to submit that the bankruptcy notices and the said orders need not be obeyed but this must now be read in the light of what was said recently in the Supreme Court case of *Wee Choo Keong v. MBf Holdings Berhad & Anor.* [1993] 2 AMR 28: 1205 SC, p. 1209, *viz.*:

Obedience to Court Order

> It is established law that a person whom an order of Court has been issued is duty bound to obey that order until it is set aside. It is not open for him to decide for himself whether the order was wrongly issued and therefore does not require obedience. His duty is one of obedience until such time as the order may be set aside or varied.

Ms. S.A. Wong, learned Counsel for the creditor, submitted that the motion ought to be dismissed. One of the grounds for dismissal is that it is an abuse of the process of the Court for the debtor to have made the present application because the debtor, as adverted to earlier, had in 1987 made a similar application to annul and rescind the said orders which application was dismissed by the High Court and the debtor's appeal against the decision to the Supreme Court was withdrawn. The present application, submitted learned Counsel, is a collateral attack upon the final decision of a Court of competent jurisdiction, citing *Tractors Malaysia Bhd. v. Charles Au Yong* [1982] 1 MLJ 320, p. 321, where it is said:

> In our judgment the Malacca action is tantamount to a collateral attack upon a final decision of a Court of competent jurisdiction. Since writing this judgment we have come across a decision of the House of Lords on this very point in *Hunter v. Chief Constable of the West Midlands Police*[1] where a civil case was started obviously to try and overrule a decision of a Criminal Court. There Lord Diplock said at p. 914:
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> > My Lords, collateral attack upon a final decision of a Court of competent jurisdiction may take a variety of forms. It is not surprising that no reported case is to be found in which the facts present a precise parallel with those of the present case.

He then cited with approval the following passage as expressing the principle to be followed by the Courts:

> ... the Court ought to be slow to strike out a statement of claim or defence and to dismiss an action as frivolous and vexatious, yet it ought to do so when, as here, it has been shewn that the identical question sought to be raised has been already decided by a competent Court. (per Lord Halsbury LC in *Reichel v. Magrath* [1889] 14 App. Cas. 665, 668).

I agree with learned Counsel that the debtor is attempting by the present motion to challenge a decision of a competent jurisdiction which decision the debtor did not pursue the appeal he had filed and is an abuse of the process of the Court.

In any event and since the Court has a discretion, I cannot see any factors in favour of the debtor that should move the Court in exercising its discretion in his favour. All the debtor said in his affidavit is that the proceedings are, for the reasons already mentioned, invalid. He never explained whether he can settle the judgment debt or whether he is going to. He never explained why he only took out the present motion on 7 August 1991, when he was adjudged a bankrupt more than four years ago on 30 April 1986. As for the exercise of the discretion it is relevant to bear in mind the commercial morality of our country. This is how Buckley J in *Re Telescriptor Syndicate Ltd* [1903] 2 Ch 174, *The Digest*, Vol., 4(2), para. 4286, said:

> Where application is made in bankruptcy to annul an adjudication, the Court refuses to act upon the mere assent of the creditors in the matter, and considers not only whether what is proposed is for the benefit of the creditors, but also whether it is conducive or detrimental to commercial morality and to the interests of the public at large. The mere consent of the creditors is but an element in the case. The Court has to exercise a discretion. It is bound to regard not merely the interests of the creditors; it has a duty with regard to the commercial morality of the country.

Therefore, the interests of the public ought to be considered and this was recognised even earlier in *In re Hester, supra*, cited by Ms S.A. Wong, where, when considering the discretion under s. 35 of the English Bankruptcy Act 1883, which material part is similar to our Act it is, at p. 633, said:

> ... The language of s. 35 is somewhat vague, and I think it was intended that the application should be made on purely technical grounds, which might or might not have been successful at the time when the order was made, but that the words were meant to apply to larger objective - more equitable objections - such, for instance, as that the matter cannot be successfully worked out in bankruptcy, that the objects of the law of bankruptcy cannot be sufficiently attained by an adjudication, and that there are reasons why, in the interest of all the creditors, and without detriment to the public, the adjudication may be annulled. I think the section gives the Court a very wide discretion.

and at p. 635, the Court said:

> If the debtor goes on, the creditors who were aware of his position will put pressure upon him, and their solicitors will get their costs, but the creditors themselves will be no nearer getting paid their debts than they were before. On the other hand, if persons among the public who are ignorant of the debtor's deplorable position, can be found to trust him, then, no doubt, he may raise money by means of which he can pay his existing creditors. But that can only be done by taking advantage of the want of guile of the future creditors who are to trust him. That is really what this proposal comes to. "Let me go on and see if I cannot get some of my creditors something more than if my business is wound up now." We should not be doing our duty to the community if we were to sanction the rescission of the receiving order. To my mind, this man is hopelessly insolvent. Without any estimate, even by himself, much less by any competent person, of his present position - his assets and liabilities - he asks us to take for granted that, if he is allowed to go on, he will be able to pay his creditors in full. I am perfectly certain that he will not. He will probably succeed in very much enlarging the area of his indebtness, but I am pretty certain that he will not diminish it ...

In that case, despite the consent of the creditors, the Court refused to annul the receiving order. The interest of the community, which would include that of the creditors, should be taken into account (*Re Seow Yin Foong* [1994] 2 CLJ 845). I have also, in the unreported case of *In re Hong Kim Sime*, High Court, Tawau, Bankruptcy Petition No. 140 of 1993, 5 August 1994, expressed similar sentiment in a matter relating to an application for a stay of bankruptcy petition which is no less applicable to this case and what I said there are in the following terms:

> The needs of society sometime influence the development of the common law (and the enactment of statutes) and thus influence the exercise of judicial discretion. That is, the law is oftentimes reflective of what society thinks a society should be and this includes how its populace should behave (like for example, coming to Court with a clean hand). It also takes cognisance of the economic needs of the times (like for example, construing a contract to give it business efficacy and the granting of Mareva and other injunction). Therefore, and it is trite law, that the particular facts and circumstances of a case and the needs of society will have to be considered when deciding whether to grant a stay ...
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> ... It is unfortunate that our Courts, including the highest Court of the land, had seen quite a lot of cases pertaining to bankruptcy proceedings. This case will, as of right of the debtor, also end up in the Appellate Court if there is an appeal which brings me to the question why a debtor who does not or cannot dispute the debt owing is allowed to make use of the Courts in this way and, as a result thereof, wastes the taxpayers' money as well (because it is from the taxes that the Judges and staff are paid) in his effort to avoid the consequence of his not paying the debt. I am of the view that the bankruptcy laws ought to be changed to prevent a debtor who does not or cannot dispute a debt from asserting that

a bankruptcy notice or a bankruptcy petition is void (for failure to comply with the bankruptcy rules). If this is not done, a recalcitrant debtor, ensconcing in the cradle of the legal process, would rather decimate his assets by expending money on legal proceedings than pay the creditors. This is surely not what the bankruptcy law intends and not what society approves. It is also not consonant with good business ethics which society aspires for, which is that one must pay what one owes. Just because there is an appeal on a serious point of law, assuming it is such, it cannot justify a stay; it is less so in our case when the debt is not disputed. It does no good to the image of our country as a rising economic power to countenance debtors who not only do not pay their debts but can involve their creditors in costly litigation. The judicial stance should be to discourage such debtor from wasting the precious time of the Court notwithstanding the penal nature of bankruptcy proceedings (actually, more beneficial than penal in that bankrupts could be discharged after paying ten cent for every dollar owed when the body of creditors agreed and in most cases they agree to put an end to the matter) ...

In our case the debtor had not even filed his statement of affairs with the Official Assignee. He runs up debts which he does not bother to pay and he cares not to tell the Court how he proposed to settle the debt. This is surely not conduct which the Court approves of. Worst of all, the debtor managed to drag all his creditors into Court time after time with his fruitless or aborted litigation and thus put not only the creditors to great expense but the taxpayers as well. His indebtedness 10 years ago, to just one creditor was RM2,323,599.17 not including interest. He, in the absence of evidence to the contrary, can rightly to be said to be hopelessly insolvent. The Court should not let him loose and set him upon the unwary businessmen to get credit and to incur more debts.

Conclusion

I therefore dismiss the motion with costs.